United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 17-0659**
	)	**Issued: September 21, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Hempstead, NY, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 1, 2017 appellant, through counsel, filed a timely appeal from an August 9, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has established a traumatic injury causally related to the accepted December 5, 2015 employment incident.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

On appeal counsel contends that the medical evidence of record establishes that on December 5, 2015 appellant suffered an aggravation of a preexisting injury to his back.[3] He further contends that, at the very least, the medical evidence of record was sufficient to require further development of the record.

FACTUAL HISTORY

On December 5, 2015 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he experienced low back and leg pain while lifting a bucket of mail weighing 25 to 30 pounds out of a relay box. He stopped work on December 5, 2015.

The employing establishment controverted appellant's claim alleging that he had an ongoing back condition for the past four years and that he had been out on sick leave from September 14 through October 13, 2015 due to back pain.

By letter dated December 23, 2015, OWCP informed appellant that further factual and medical evidence was needed to support his claim. Appellant was afforded 30 days to submit this evidence.

In progress notes detailing appellant's visit to urgent care on December 5, 2015, Dr. Jonathan Weinstein, a Board-certified cardiologist, indicated that appellant complained of onset of back pain two hours earlier and had occurred when he was lifting a 30-pound mailbag. He also noted that appellant had experienced low back pain for the past five years. Dr. Weinstein diagnosed low back pain.

In a December 16, 2015 report Dr. Ira Owen, a physician specializing in emergency medicine, noted that appellant presented with back pain, onset one to two weeks ago. He related that this encounter was related to a workers' compensation claim. Dr. Owen diagnosed radiculopathy, lumbago, and muscle spasm of the back.

In a January 6, 2016 report, Dr. Jason Fritzhand, an osteopath specializing in physical medicine and rehabilitation, noted that appellant had back pain for the past five years. He reported that on December 5, 2015 appellant was lifting heavy mail at work and developed sharp pain on both sides of his lower back which radiated to his bilateral thighs. Dr. Fritzhand diagnosed chronic lower back pain with new onset of lumbar radiculitis. He also noted likely herniated nucleus pulposus. Dr. Fritzhand recommended diagnostic studies and that appellant remain out of work.

By decision dated January 28, 2016, OWCP denied appellant's claim finding the evidence of record was insufficient to establish that the incident occurred as alleged. It also found that appellant had not submitted any medical evidence to establish a diagnosed medical condition causally related to the alleged employment incident.

[3] Appellant's prior claim for an employment-related October 5, 2009 injury was accepted for subluxation of the lumbar spine and was assigned File No. xxxxxx627.

An x-ray of the lumbar spine taken on January 26, 2016 was interpreted by Dr. Renata La Rocca Vieira, a radiologist, as showing no listhesis or instability. She also noted mild multilevel discogenic degenerative disease, most pronounced at L4-5. Dr. Vieira noted no evidence of acute fracture.

In a January 26, 2016 report, Dr. Fritzhand, noted that the x-ray of the lumbar spine performed that date revealed no sign of spondylolisthesis. He did note mild disc space narrowing and degenerative changes at L4-5. Dr. Fritzhand diagnosed chronic low back pain with new onset of lumbar radiculitis and likely herniated disc.

On February 17, 2016 appellant requested an oral hearing before a hearing representative with OWCP's Branch of Hearings and Review.

A February 4, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine was interpreted by Dr. Vidya Malhotra, a Board-certified radiologist, as showing mild levocurvature of the lumbar spine, mild disc desiccation at L4-5 and L5-S1, minimal grade 1 retrolisthesis seen at the L4-5 level, posterior bulging disc at L5-S1, L4-5, and L3-4, and left paramedian disc herniation with small extruded disc fragment at T12-L1.

In a March 8, 2016 report, Dr. Mark A.P. Filippone, a Board-certified physiatrist, noted that on December 5, 2015 appellant reached down and forward to reach for a bucket full of mail weighing somewhere between 20 to 40 pounds and that, when he was lifting the bucket out of a box, he noted an intense pain in his lower back, more on the left than on the right, with immediate radiation into the anterolateral aspect of the left thigh. He noted a prior injury to appellant's back. Dr. Filippone diagnosed exacerbation of prior injury to the low back with polyradiculopathy based on the neurologic physical examination. He explained that the presentation implicated the T12-L1 nerve roots on the left side verified by a left paramedian disc herniation with small extruded disc fragments seen at the T12-L1 level compressing thecal sac on the left side. Dr. Filippone noted that further diagnostic studies were needed. He opined that appellant remained totally disabled as the result of injuries he sustained while working for the employing establishment.

At the hearing held on May 26, 2016, appellant testified that he had worked for the employing establishment since June 1996 as a letter carrier. He noted that he had sustained a prior injury on October 5, 2009 while loading his bag, but that this injury was the first time he ever had a back issue. Appellant noted that he was able to return to work after that injury. He indicated that he did have flare-ups of back pain for which he had to take leave. Appellant noted that on December 5, 2015 he felt a sharp pain when he lifted a bucket full of mail. He described his medical treatment and indicated that the delay in treatment and x-rays was because he had not been approved for workers compensation. Appellant noted that he has not returned to work since the alleged December 5, 2015 injury. Counsel argued that appellant's credible testimony as to how the incident occurred should be accepted. He also asserted that it was unfair to find that appellant had delayed seeking treatment, noting he was examined by Dr. Weinstein on December 5, 2015 and Dr. Owen on December 16, 2015. Counsel also argued that Dr. Fritzhand did identify a firm diagnosis. He requested that the record be held open for 30 days to submit further information on causal relationship. No further evidence was received by OWCP.

By decision dated August 9, 2016, the hearing representative modified OWCP's prior decision. He found that appellant had established that the employment incident of December 5, 2015 occurred as alleged, but that the medical evidence of record failed to establish that the accepted incident caused a personal injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was caused in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether fact of injury has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident identified by the employee.[8] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[9]

ANALYSIS

In the decision dated August 9, 2016, OWCP's hearing representative determined that the employment incident of December 5, 2015 occurred as alleged. However, he denied appellant's claim, finding that appellant failed to meet his burden of proof to establish a personal injury causally related to the accepted employment incident.

[4] *Joe D. Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *John J. Carlone*, 41 ECAB 354 (1989).

[7] *Id.*

[8] *I.J.*, 59 ECAB 408 (2008); *supra* note 5.

[9] *James Mack*, 43 ECAB 321 (1991).

Dr. Weinstein examined appellant on December 5, 2015, the date of the employment accepted incident. However, Dr. Weinstein did not diagnose a medical condition related to the incident. Rather, he merely diagnosed lower back pain. However, pain is not a medical diagnosis and subjective complaints of pain are insufficient, in and of themselves, to support a claim for benefits under FECA.[10]

Dr. Owen briefly noted that appellant returned for a workers' compensation follow-up on December 16, 2015. He did not, however, provide a medical opinion linking appellant's medical condition to the December 5, 2015 employment incident. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[11]

Dr. Fritzhand briefly noted appellant's December 5, 2015 employment incident, but failed to provide a rationalized opinion on causal relationship. The opinion of the physician must be based on a complete factual and medical background of the employee, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident.[12] The report of Dr. Fritzhand is therefore of limited probative value on the issue of causal relationship.

Drs. Malhotra and Vieira interpreted diagnostic studies but reached no conclusion on causal relationship. Thus, their opinions are therefore of limited probative value.[13]

Dr. Filippone's opinion also does not constitute rationalized medical evidence supporting causal relationship. He diagnosed exacerbation of the prior injury in the low back with polyradiculopathy. Dr. Filippone also discussed appellant's employment incident of December 5, 2015. He concluded that appellant's injuries were sustained while working for the employing establishment, and that he was totally disabled. Dr. Filippone did not, however, clearly explain how the December 5, 2015 incident caused or aggravated appellant's medical condition. He did not explain how the mechanism of incident would have physiologically caused the diagnosed condition.[14] The Board has long held that a mere conclusion, without the necessary rationale explaining how and why the physician believes that appellant's accepted employment incident resulted in a diagnosed condition, is insufficient to meet appellant's burden of proof.[15]

An award of compensation may not be based on surmise, conjecture, speculation, or appellant's belief of causal relationship.[16] The Board finds that appellant has failed to submit

[10] *C.W.*, Docket No. 15-0667 (issued July 22, 2015).

[11] *E.R.*, Docket No. 16-1634 (issued May 25, 2017).

[12] *J.S.*, Docket No. 16-1769 (issued May 24, 2017).

[13] *G.M.*, Docket No. 14-2057 (issued May 12, 2015).

[14] *See R.R.*, Docket No. 16-1901 (issued April 17, 2017).

[15] *Supra* note 13.

[16] *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*¸30 ECAB 57 (1979).

rationalized medical evidence to meet his burden of proof on causal relationship to establish his claim for disability.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established a traumatic injury causally related to the accepted December 5, 2015 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2016 is affirmed.

Issued: September 21, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board